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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KAREN MARTIN, Defendant and Appellant.	F029478 (Super. Ct. No. VF31442) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Ronn M. Couillard, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Margaret Venturi and Susan J. Orton, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of the Procedural History, Factual History, and Parts I, III, IV and V.

The defendant in this case was involved in three vehicular accidents, two of which resulted in bodily injuries to others, in the span of less than one hour. In the third accident, she killed a four-year-old child strapped in a child safety seat in the back seat of his mother's vehicle. Defendant's blood alcohol level was .27 percent. She was convicted of second degree murder, gross vehicular manslaughter while intoxicated, and other related charges.

On appeal, defendant challenges the constitutionality of Penal Code section 22[1] and argues she was improperly instructed with CALJIC No. 4.20, rather than CALJIC No. 4.21, relating to the relevancy of evidence of voluntary intoxication. We find section 22 constitutional and affirm the second degree murder conviction.

PROCEDURAL HISTORY[*]

By information, Karen Martin (defendant) was charged with the murder of Ian Busby (count 1; § 187, subd. (a)); gross vehicular manslaughter of Ian Busby while intoxicated (count 2; § 191.5, subd. (a)); driving under the influence of alcohol or drugs causing bodily injury to Kathleen Busby (count 3; Veh. Code, § 23153, subd. (a)); driving with a blood alcohol level of .20 percent or more causing bodily injury to Kathleen Busby (count 4; Veh. Code, §§ 23153, subd. (b), 23206.1); driving under the influence of alcohol or drugs causing bodily injury to Chris James Holcomb (count 5; Veh. Code, § 23153, subd. (a)); driving with a blood alcohol level of .20 percent or more causing bodily injury to Chris James Holcomb (count 6; Veh. Code, §§ 23153, subd. (b), 23206.1); and misdemeanor hit-and-run driving (count 7; Veh. Code, § 20002, subd. (a)). As to counts 3 and 4, the information also alleged defendant proximately caused bodily injury to more than one victim, Susan Parma and Ashkan Vahdat (Veh. Code, § 23182),

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1 All statutory references are to the Penal Code unless otherwise indicated.

***** See footnote *, *ante*.

and personally inflicted great bodily injury upon Kathleen Busby (§ 12022.7). Defendant pled not guilty to all charges and denied the special allegations.

Prior to trial, defendant moved for a change of venue. The court denied her request without prejudice to renew the motion during the voir dire process. The People filed an *in limine* motion to preclude expert testimony on whether defendant could form the requisite mental intent as a result of her intoxication. The court granted the People's motion, and precluded expert testimony on the effect of alcohol on defendant's knowledge of the danger her actions posed to others. Before the jury was sworn, defendant renewed her motion for a change of venue, and it was again denied.

A jury found defendant guilty on all counts and found true the special allegations on counts 3 and 4 that defendant proximately caused bodily injury to Ashkan Vahdat and personally inflicted great bodily injury upon Kathleen Busby. The jury found not true the special allegation that defendant proximately caused bodily injury to Susan Parma.

Defendant was sentenced to 22 years 8 months to life, calculated as follows: 15 years to life on count 1 and the upper term of 3 years on count 3, plus 1 year for the Vehicle Code section 23182 enhancement and 3 years for the section 12022.7 enhancement, count 1 to run consecutive to count 3. Defendant was also sentenced to a consecutive term of eight months on count 5, and a concurrent term of six months on count 7. The court imposed a sentence of ten years on count 2, the upper term of three years, plus a four-year enhancement, on count 4, and eight months on count 6, but stayed those sentences pursuant to section 654. The trial court also ordered defendant to pay a restitution fine in the amount of $10,000, pursuant to section 1202.4, and a second fine of $10,000 pursuant to section 1202.45, but suspended the latter fine pending defendant's successful completion of parole.

Defendant timely filed her notice of appeal.

FACTUAL HISTORY[*]

I. Kneeland accident

Phillip Kneeland employed defendant as a housekeeper. On August 30, 1996, at approximately 2:30 p.m., Kneeland arrived at his home unannounced to bring his dogs back from work. He found defendant laying down on a love seat in the living room. Defendant acted groggy and slurred her response to Kneeland. Kneeland found the situation unusual, but went back to work. He returned home at approximately 5:30 p.m., parked his truck in the garage and closed the garage door. Kneeland saw defendant gather her cleaning supplies and load them into her El Camino truck. While he was changing clothes in his bedroom, Kneeland heard a loud crash that sounded as if "someone hit the house."

Kneeland discovered defendant had driven into his garage door. Defendant was sitting in her truck, with her head down. The garage door was wrapped underneath and around Kneeland's truck. Kneeland went inside the house to telephone his wife. When he returned about a minute later, defendant had left. Kneeland had a bar in his home that contained alcohol, but he was unable to determine if any alcohol had been consumed by defendant. He never observed defendant drinking, or saw her intoxicated prior to that day. Kneeland denied making a statement to his employees that he threw defendant out of his house.

II. Holcomb accident

At approximately 5:30 p.m. that same day, Christopher James Holcomb was driving his Datsun coupe east on Mineral King extension, along Highway 198 near Akers, when he saw a white El Camino coming toward him on the wrong side of the road. Holcomb estimated the El Camino was traveling 40 miles per hour, and he moved farther over to the right side of the road to steer clear of it. When the El Camino failed to

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[*] See footnote *, *ante*.

return to the proper lane, Holcomb swerved to the left into the dirt shoulder to avoid a collision, but the El Camino hit his vehicle on the right side. Holcomb sustained cuts on his arms from the broken glass and injuries to his back. His vehicle was unsalvageable.

After the collison, Holcomb got out of his car and pushed it off the road. At Holcomb's suggestion, defendant, who was driving the El Camino, also moved her vehicle off the road. Holcomb said defendant had trouble walking and was moving back and forth to her car, repeatedly locking it. Defendant was not speaking clearly, and Holcomb had difficulty understanding her. She was talking to herself, and at one point said, "'Why am I doing this again?'" Defendant told Holcomb his vehicle was already in that condition prior to the accident. Holcomb and defendant exchanged some information, but defendant was unable to write down Holcomb's driver's license number. Holcomb did not smell alcohol on defendant's breath.

Holcomb told defendant to wait while he telephoned the police. By the time Holcomb returned from a nearby veterinary clinic, defendant and her El Camino were gone. A Visalia police officer arrived approximately five minutes later and took a report. While the officer was calling in the information on the radio, Holcomb saw defendant's El Camino run a red light and hit another vehicle at the intersection of Highway 198 and Akers. Holcomb estimated that defendant was traveling approximately 70 miles per hour. Holcomb told the officer that was the car that hit him. The officer called for emergency personnel and responded to the scene of the second accident.

III. Busby accident

On August 30, 1996, at approximately 6 p.m., Kathleen Busby and her four-year-old son Ian were traveling in their Ford Taurus station wagon south on Akers in the right lane. Ian was strapped in a child safety seat in the middle of the backseat of the vehicle. Busby stopped at the signal light at the intersection of Akers and Highway 198. Highway 198 is a four-lane, two-way roadway that runs east and west. Akers is a four-lane, two-way roadway that runs north and south. The speed limit along Highway 198 at the Akers intersection is 45 miles per hour. The corresponding speed limit on Akers is 50 miles per

hour. When the light turned green, Busby proceeded into the intersection. At the same time, defendant, traveling east on Highway 198, ran the red light and smashed into Busby's vehicle. The impact of the collision pushed Busby's car to the other side of the intersection.

A number of people witnessed the collision. Susan Parma, traveling northbound on Akers, was stopped at the intersection when she saw defendant's El Camino hit the passenger side of Busby's Taurus. Parma testified the impact spun Busby's vehicle into a Mazda Miata parked next to Parma. The Miata then hit Parma's Honda Accord. Parma had injuries to her back and later suffered from severe headaches. Parma estimated the speed of the El Camino to be between 50 and 55 miles per hour at the time of the collision.

Ashkan Vahdat was driving the Miata north on Akers. He saw the El Camino travel east through the intersection with all four wheels locked and the tires screeching and generating smoke. Vahdat estimated the speed of the El Camino to be between 55 and 65 miles per hour. Vahdat testified his Miata was struck by Busby's vehicle and, in turn, collided with Parma's Honda. Vahdat suffered injury to his head from hitting the steering wheel. Kristin Bean, a passenger in Vahdat's Miata, also heard screeching tires as she saw the El Camino traveling through the intersection.

Joe Coppola was stopped in the westbound lane on Highway 198. He witnessed the El Camino run the red light and hit Busby's Taurus. In addition, approximately 15 minutes before the accident, Ruby Rodriguez witnessed defendant's El Camino swerving across the westbound lanes on Highway 198. Rodriguez, who had stopped on Highway 198 to check a low tire on her vehicle, was almost hit by the El Camino, which veered across two lanes of traffic before exiting onto Demaree.

Emergency personnel were dispatched to the scene. Ian was cut from his car seat and administered mouth-to-mouth resuscitation before the ambulance arrived. He later died at the hospital. An autopsy confirmed the cause of death was a broken neck--Ian's spinal cord was dislocated from the base of his skull. Kathleen Busby sustained a rib

fracture, a laceration to the right side of her scalp, and soft tissue trauma to her knees and right ankle. Defendant was immobilized on a spinal board with a cervical collar and blocks and transported to the hospital. She was combative and resistive of the seat belts that were in place on the board. Defendant had a strong odor of alcohol on her breath. When asked whether she had been drinking, defendant responded no, she was allergic to alcohol. Defendant expressed her concern to emergency personnel on the scene with " 'the son-of-a-bitch that caused the accident.' " One of the emergency medical technicians testified that it is not uncommon for persons with head injuries to be combative and disoriented.

The nurse who attended to defendant at the hospital also noticed the smell of alcohol on defendant's breath and the slurring of her speech. When asked whether she had been drinking, defendant again responded that she had not been drinking because she was allergic to all types of alcohol. Defendant also asked the nurse, " 'Where is the son-of-a-bitch that hit me?' " Defendant used other foul language and was uncooperative, yelling at hospital staff and threatening legal action. Defendant suffered facial contusions, swelling of her forehead, a laceration to the right temple area, and abrasions and contusions to her knees and right chest wall.

Police interviewed defendant at the hospital. She had loud slurred speech and an odor of alcohol on her breath. Her demeanor alternated between being angry and upset and laughing. Defendant asked who hit her and believed she had been involved in a hit-and-run accident. She threatened to kill those people and beat them up. Defendant waived her *Miranda*[2] rights and gave a statement to police. She said she had just come from cleaning a friend's house and was traveling to the friend's office when she was involved in an accident. According to defendant, she was westbound on Highway 198 in the right lane and was the first vehicle stopped at the red light. She looked both ways,

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[2] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

saw no cars and then proceeded to pull out when she was hit. She told police she does not drink, as she is allergic to alcohol. Defendant was arrested for felony driving under the influence. A blood test revealed defendant's blood alcohol level was .27 percent. Defendant tested negative for drugs.

An expert in accident reconstruction reviewed the traffic collision report, photographs taken at the scene, a signal phasing diagram from Caltrans, and measurements of the accident scene, vehicle crush and damage, and concluded the El Camino's speed at the time of braking was 60 miles per hour. The expert opined defendant's brakes were applied 53 feet before impact with the Taurus and estimated the El Camino's speed at the time of impact at 50 miles per hour, while the speed of the Taurus was 22 miles per hour. He also concluded the El Camino ran a red light at the time of the collision.

IV. Defense

Dr. Raymond Deutsch, a specialist in "addiction medicine," testified in defendant's behalf. He explained the American Medical Association first recognized alcoholism as a primary disease in 1955, and characterized alcoholism as craving, loss of control, and continued use despite adverse consequences. A disease of the central nervous system, Deutsch testified alcoholism is driven by an "addiction center" in the mid-brain or "feeling" portion of the brain. Deutsch opined that .27 percent blood alcohol is a high level of intoxication that would have a marked effect on judgment and motor coordination. According to Deutsch, for those suffering from alcoholism, the decision to drink is not subject to will power control.

Deutsch testified that he examined defendant and concluded she had classic aggressive alcoholism. Both of defendant's parents were alcoholics, and defendant's father committed suicide while intoxicated. As a result, Deutsch opined that defendant had both biogenetic and environmental stresses leading to the early onset of alcoholism in her teens. She had relatively brief periods of drinking, intermixed with long episodes of attempted abstinence and voluntary participation in treatment programs.

Jose Fortino Garcia, an acquaintance of defendant's son and a former employee of Kneeland, testified to an office conversation concerning the traffic accident. According to Garcia, Kneeland said defendant had gotten into his wet bar and passed out drunk. Kneeland said he cursed at defendant, called her "a fucking bitch," terminated her on the spot and ordered her to leave his house. Garcia recalled that Kneeland said defendant hit something in his yard when she left.

DISCUSSION

I. Restriction on expert testimony[*]

Defendant argues she was denied due process because the trial court prohibited her expert witness, Dr. Raymond Deutsch, from testifying regarding the effect of alcohol on her ability to have "knowledge" of danger to others. Defendant contends the court's ruling, based on section 22, restricted her ability to present a defense. We disagree.

A. The trial court's ruling

The People filed an *in limine* motion to preclude expert testimony on whether defendant could form the requisite mental intent as a result of her intoxication. Relying on section 22, the People sought to exclude the following conclusion of Deutsch: "The resulting blood alcohol of 0.27 percentage markedly impaired [defendant's] mental capabilities to formulate the mental state of knowledge of the danger to others and the disregard of human life her actions would have." Defendant maintained that section 22 is in direct contravention to the California Supreme Court's decision in *People* v. *Whitfield* (1994) 7 Cal.4th 437, as well as the reasoning in *People* v. *Reyes* (1997) 52 Cal.App.4th 975.

The trial court then stated:

> "THE COURT: Since Whitfield, Section 22 was amended, that being effective January 1, 1996. I don't know how much clearer it can get.

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[*] See footnote *, *ante*.

The way it's read, it talks about voluntary intoxication not being admissible on the issue of knowledge. And (b) of Penal Code Section 22 indicates exactly where it is admissible, that is, where voluntary intoxication is admissible.

"It says solely on the issue of whether or not the defendant actually formed a required specific intent. Something we're not dealing with here. Or in the murder, whether the defendant premeditated, deliberated or harbored express malice aforethought. That, again, is not something we are dealing with here because there is no requirement here in the way this case is pled that the defendant had a specific intent, or put another way, an express malice. What I will do, I will read the Reyes case that you cited and see what I glean from that.

"My tentative ruling is that it's not to be admissible on the area of knowledge...."

The matter was continued to the following day, where argument continued:

"[DEPUTY DISTRICT ATTORNEY]: I've also read the [*Reyes*] case, your Honor. It does not appear to be on point. In fact, the footnote six on page ninety-four of the official citation indicates the reason this case does not apply to a murder case where the issue is implied malice.

"THE COURT: That's the reading I get of the case, irregardless of the footnote. It appears that the court, in deciding the Reyes case, was referring it strictly to a receiving stolen property situation. Quite honestly, I don't really follow the reasoning. I don't know how they can equate knowledge to a specific intent. In any event, they did. One might disagree with that. It does fly in the face of Penal Code Section 22 as presently in force.

"In any event, it was related to a receiving stolen property case and specifically noted not to apply to a murder case. I'm going to make a finding that it does not apply, it is not controlling in our situation here. Accordingly, I would not allow Dr. Deutsch, or any other expert, to testify on the issue of knowledge or the lack thereof in respect to the second degree murder as related through the concept of voluntary intoxication.

"Let me reword that, that's really convoluted. I'm making a finding that the issue of knowledge is not to be testified to by any expert here as to whether or not [defendant] had knowledge or did not have knowledge. That would be based upon the concept that voluntary intoxication cannot be used as a defense in this particular instance on the issue of knowledge. It could only be used if this were a specific intent crime, which obviously it is not. It's a crime involving implied malice, which is not specific intent.

"[DEFENSE COUNSEL]: Can you clarify, knowledge of what?

"THE COURT: As you have indicated here, the resulting blood alcohol of .27 percent markedly impaired her mental capacity to formulate the mental state of emergency of danger to others and the disregard to human life her actions would have. We get into the jury instructions, the concept of second degree murder based upon an implied malice theory will have something to do with the willful and wanton activity relating to the danger to others. And knowledge is a factor involved there.

"What I'm assuming you want to do is to have Dr. Deutsch testify that this voluntary intoxication would impair her knowledge of this danger to others. That's the way I read it. If that's the case, that would be inadmissible, flying in the face of Penal Code Section 22 and the law presently in existence."

B. Standard of review

"As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused." (*People* v. *Page* (1991) 2 Cal.App.4th 161, 187; see also *People* v. *McAlpin* (1991) 53 Cal.3d 1289, 1299.)

C. Deutsch's testimony

Defendant's claim that the court improperly restricted Deutsch's testimony rests on two principal arguments. First, defendant asserts the court misconstrued section 22 and violated her due process rights by improperly restricting her ability to present a defense. Alternatively, defendant argues that, to the extent the court accurately applied section 22, the statute is unconstitutional. Defendant's reliance on section 22 is misplaced.

The testimony of Deutsch was properly excluded by the court under sections 28 and 29 as impermissible expert opinion on the ultimate question of malice aforethought. Moreover, even assuming the court erred in restricting the testimony, the error was harmless, since Deutsch was permitted to testify on defendant's alcoholism and her intoxication on the day of the accidents. Thus, defendant was not deprived of a defense. At this point, we need not address defendant's constitutional challenge to section 22, since the court's ruling is supported on other grounds. (See *Palermo* v. *Stockton*

Theatres, Inc. (1948) 32 Cal.2d 53, 65-66 [court will not decide constitutional question where other grounds are available and dispositive of issues of the case]; accord *Community Redevelopment Agency* v. *Force Electronics* (1997) 55 Cal.App.4th 622, 630.)

1. Expert opinion on ultimate question of malice aforethought

Pursuant to section 28, subdivision (a), evidence of mental disease, mental defect, or mental disorder is inadmissible to show or negate the capacity to form any mental state, including purpose, intent, knowledge or malice aforethought. Instead, such evidence "is admissible solely on the issue of whether or not the accused actually formed a required specific intent … or harbored malice aforethought, when a specific intent crime is charged." (§ 28, subd. (a).) Under section 29, an expert testifying in the guilt phase of trial about a defendant's mental illness, mental disorder, or mental defect "shall not testify as to whether the defendant had or did not have the required mental states, which include … intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states" is for the trier of fact. (§ 29.)

The language of sections 28 and 29 allows the presentation of expert testimony relevant to whether a defendant harbored a required mental state or intent at the time he acted. (*People* v. *Nunn* (1996) 50 Cal.App.4th 1357, 1365.) However,

> "section 29 … prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted. An expert may not evade the restrictions of section 29 by couching an opinion in words which are or would be taken as synonyms for the mental states involved. Nor may an expert evade section 29 by offering the opinion that the defendant at the time he acted had a state of mind which is the opposite of, and necessarily negates, the existence of the required mental state." (*Id.* at p. 1364.)

For example, section 29 has been held to bar an expert's opinion that, based on the defendant's inebriation and tendency to overreact to stress, the defendant fired a rifle impulsively, i.e., without express malice aforethought. (*Id.* at pp. 1361-1362, 1365.)

Section 29 has also been held to exclude expert testimony concerning the effects of voluntary intoxication on a defendant's actual mental state. (*People* v. *Rangel* (1992) 11 Cal.App.4th 291, 299-303; see also *People* v. *Young* (1987) 189 Cal.App.3d 891, 906-907 [section 29 barred expert testimony on whether defendant's mental illness interfered with his ability to premeditate or harbor malice]; *People* v. *Whitler* (1985) 171 Cal.App.3d 337, 340-341 [sections 25, 28 and 29 prevented defendant from introducing expert testimony that she did not possess the requisite mental state at the time of the killing]; *People* v. *Lynn* (1984) 159 Cal.App.3d 715, 733 [section 29 precluded defense expert from testifying on whether defendant premeditated or deliberated].)

Here, the expert testimony excluded by the trial court--that defendant's blood alcohol level impaired her mental capabilities to formulate the mental state of knowledge of danger to others--constitutes impermissible expert opinion on the ultimate issue of whether defendant acted with implied malice aforethought. It is inadmissible under sections 28 and 29. In effect, defendant wants this court to make involuntary intoxication an absolute defense to second degree murder. This we will not do.

2. Harmless error

Moreover, even assuming the court erred in restricting Deutsch's testimony, the error was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24 [before constitutional error can be held harmless, court must be able to declare a belief it was harmless beyond a reasonable doubt]; *People* v. *Rangel, supra,* 11 Cal.App.4th at p. 303 [harmless beyond a reasonable doubt standard applied to exclusion of expert's ultimate opinion on defendant's mental state].)

Here, the jury heard extensive testimony on alcoholism in general and its effects on defendant. Deutsch testified that alcoholism has behavioral characteristics of craving, loss of control and continued use despite adverse consequences. Deutsch explained that alcoholism is a disease of the central nervous system, driven by an addiction center in the mid-brain. He testified that addiction neurons are in the lower brain (or feeling portion of the brain) not well connected with the cortex (or thinking portion of the brain). As a

result, the cortex does not have much effect on the craving. Deutsch discussed the manner in which alcohol impairs a person, describing the disinhibiting and depressant effects of alcohol and resulting impulsive statements originating in the feeling portion of the brain. Deutsch also testified that alcohol use impairs judgment, and opined that, for those suffering from alcoholism, the decision whether to drink is not subject to will power control.

The jury also heard testimony on the effects of alcohol on defendant specifically. Deutsch testified that a .27 percent blood alcohol is a high level of intoxication that would have a marked effect on the judgment and motor coordination of an adult female. Deutsch explained that defendant suffered from classic aggressive alcoholism, stemming from both biogenetic and environmental stresses when she was a child. He set forth the long history of alcoholism in defendant's family and the early onset of defendant's alcoholism. Deutsch testified that defendant had relatively brief periods of drinking, intermixed with long episodes of attempted abstinence and voluntary participation in treatment programs. Numerous other witnesses, including police and emergency personnel, offered additional testimony regarding the effects of alcohol on defendant. These effects include combative and resistive behavior, disorientation, slurred speech, use of foul language, an uncooperative attitude, and an alternating demeanor.

Consequently, defendant was not prevented from presenting evidence that her intoxication affected her ability to have knowledge of the danger of her actions to others. In fact, during closing argument, defense counsel referred to the above testimony and argued that defendant's alcoholism, while not an excuse, did negate implied malice aforethought. Defense counsel stated:

> "You've heard about [defendant's] confusion, her anger, her inappropriate behavior, her vulgar language an[d] bizarre actions during the course of this day. And when you look at all the testimony regarding [defendant's] demeanor, I think you have to conclude there is something seriously wrong, something seriously wrong with her that day. Her ability to function normally was just shot. Not just in her body, the fact she could hardly stand up and the slurred speech and what have you, but her brain,

> her ability to think was shot. The alcohol abuse that day fed into her disease. It did something to her. It made her a person very much different than the person you see sitting here in this courtroom. Her behavior was damaged. [¶] Murder, as you just heard, requires proof that actions leading to the death were deliberately performed. There is an element of intentionality there."

As a result, we find defendant was not denied due process of law. Any error in precluding Deutsch's opinion on the ultimate issue of defendant's actual mental state was harmless beyond a reasonable doubt.

II. Instructional error

Defendant contends the court committed reversible error in instructing the jury with CALJIC No. 4.20 regarding the effect of voluntary intoxication on the element of knowledge. Defendant argues the jury should have been instructed with CALJIC No. 4.21. We find no instructional error.[3]

A. Standard of review

A trial court must instruct the jury "on the law applicable to each particular case." (*People* v. *Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on other grounds in *People* v. *Barton* (1995) 12 Cal.4th 186, 201.) "[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People* v. *St. Martin* (1970) 1 Cal.3d 524, 531.) Therefore, a claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People* v. *Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) In conducting this review, we first ascertain the relevant law and then "determine the meaning of the instructions in this regard." (*People* v. *Kelly* (1992) 1 Cal.4th 495, 525.)

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3 The People contend defendant failed to object to CALJIC No. 4.20 in the trial court and the issue is therefore waived on appeal. Assuming without deciding the issue has not been waived, we address the alleged instructional error on the merits.

The proper test for judging the adequacy of instructions is to decide whether the trial court "fully and fairly instructed on the applicable law …." (*People* v. *Partlow* (1978) 84 Cal.App.3d 540, 558.) "'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole … [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.['] [Citation.]" (*People* v. *Yoder* (1979) 100 Cal.App.3d 333, 338.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People* v. *Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

B. CALJIC Nos. 4.20 and 4.21

The court instructed the jury with CALJIC No. 4.20:

"VOLUNTARY INTOXICATION---NOT A DEFENSE TO GENERAL INTENT CRIMES

> "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition.
>
> "In the crimes charged [in the Information] the fact the defendant was voluntarily intoxicated is not a defense and does not relieve [her] of responsibility for the crime."

Defendant contends the court should have instructed the jury with CALJIC No. 4.21, which provides, in relevant part:

"VOLUNTARY INTOXICATION--WHEN RELEVANT TO SPECIFIC INTENT

> ".....
>
> "If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required [specific intent] [mental state].
>
> "If from all the evidence you have a reasonable doubt whether the defendant formed that [specific intent] [mental state[s]], you must find that [he] [she] did not have that [specific intent] [mental state[s]]."

Both CALJIC Nos. 4.20 and 4.21 are based on section 22, which addresses the admissibility of evidence of voluntary intoxication and when such intoxication provides an excuse for criminal conduct. Defendant claims it was error for the court to instruct with CALJIC No. 4.20 because it prohibits the application of the defense of intoxication in a general intent crime. As a result, defendant maintains section 22 is unconstitutional, since it restricts the presentation of a defense that "negates an element of the charged crime[,]" specifically, the "knowledge" element for implied malice. We begin by presenting an overview of section 22.

C. Section 22

Section 22 states the basic principle of law recognized in California that a criminal act is not rendered less criminal because it is committed by a person in a state of voluntary intoxication. Evidence of voluntary intoxication is not admissible to negate the capacity to form any mental states for the crimes charged. However, evidence of voluntary intoxication is admissible with respect to the actual formation of a required specific intent. (§ 22.)

In addressing defendant's claim, it is useful to examine the history of the latter amendments to section 22, as explained by the California Supreme Court in *People* v. *Mendoza* (1998) 18 Cal.4th 1114, 1124-1126:

> "In 1982, the Legislature amended section 22 to provide, as relevant: '(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation or malice aforethought, with which the accused committed the act.
>
> "'(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.' (Stats. 1982, ch. 893, § 2, pp. 3317-3318.) The Legislature stated that the 1982 amendment was 'declaratory of existing law.' (Stats. 1982, ch. 893, § 5, p. 3318.)

"Most recently, in 1995, effective January 1, 1996, the Legislature amended section 22 to provide, as relevant: '(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

"'(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.' (Stats. 1995, ch. 793, § 1; see *People* v. *Castillo* (1997) 16 Cal.4th 1009, 1014, fn. 1 ….)

"....

"In *Whitfield*, we concluded 'that section 22 was not intended, in murder prosecutions, to preclude consideration of evidence of voluntary intoxication on the issue whether a defendant harbored malice aforethought, whether the prosecution proceeds on a theory that malice was express or implied.' ([*People* v.] *Whitfield* [(1994)] 7 Cal.4th [437,] 451.) Justice Mosk, joined by Chief Justice Lucas and, in a separate opinion, Justice Baxter, would have found voluntary intoxication not admissible to negate implied malice. (*Id.* at pp. 456-477 (conc. and dis. opn. of Mosk, J.); *id.* at p. 477 (conc. and dis. opn. of Baxter, J.).) The most recent amendment to section 22 came in apparent reaction to this holding. The Legislative Counsel's Digest to the bill amending section 22 stated: 'Under existing law, as held by the California Supreme Court in People v. Whitfield, 7 Cal.4th 437, the phrase "when a specific intent crime is charged" includes murder even where the prosecution relies on a theory of implied malice. [¶] This bill would provide, instead, that evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.' (Legis. Counsel's Dig., Sen. Bill No. 121 (1995-1996 Reg. Sess.).)"

The issue in *Mendoza* was whether evidence of voluntary intoxication is admissible on whether a defendant tried as an aider and abettor had the required knowledge and intent. (*People* v. *Mendoza*, *supra*, 18 Cal.4th at pp. 1123, 1126.) The court concluded the intent requirement for aiding and abetting liability is a "'required specific intent'" for which evidence of voluntary intoxication is admissible under

section 22. (*Id.* at p. 1131.) However, the court cautioned: "Our holding is very narrow. Defendants may present evidence of intoxication solely on the question whether they are liable for criminal acts as aiders and abettors. Once a jury finds a defendant did knowingly and intentionally aid and abet a criminal act, intoxication evidence is irrelevant to the *extent* of the criminal liability." (*Id.* at p. 1133; see also *Ginns* v. *Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered...."].)

It is clear that the effect of the 1995 amendment to section 22 was to preclude evidence of voluntary intoxication to negate implied malice aforethought. As explained in *People* v. *Reyes*, *supra*, 52 Cal.App.4th at p. 984, fn. 6:

> "As part of the 1995 amendment to section 22, subdivision (b), evidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought … , thus superseding the holding of *People* v. *Whitfield*. However, the court's analysis remains germane to the admissibility of evidence of intoxication to refute the element of knowledge in other types of crimes, such as receiving stolen property."

D. Constitutionality of section 22

Relying on the dissenting opinions in *Montana* v. *Egelhoff* (1996) 518 U.S. 37, defendant argues that section 22 unconstitutionally removes a relevant category of evidence--the defendant's mental state--from the jury's consideration. Defendant maintains section 22 prevented her ability to attack an element of the offense (i.e., implied malice) in violation of her due process rights. Defendant's analysis is flawed.

The Due Process Clause precludes a conviction unless the state has proved beyond a reasonable doubt every fact necessary to constitute the crime with which the accused is charged. This burden cannot be shifted to a defendant. (*Patterson* v. *New York* (1977) 432 U.S. 197, 204-205.) Thus, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (*Id.* at p. 210.)

In a plurality opinion, the United States Supreme Court in *Montana* held that a defendant's right to have a jury consider evidence of his voluntary intoxication in determining whether he possessed the requisite mental state was not a "fundamental principle of justice." As a result, the court held Montana's statutory ban on consideration of a defendant's intoxicated condition in determining the existence of a mental state, which is an element of the offense, did not violate the Due Process Clause. (*Montana* v. *Egelhoff*, *supra*, 518 U.S. at pp. 40-43, 48-51, 56, plur. opn.; see also *id*. at pp. 58-59 (Ginsburg, J. concurring).) The court reasoned:

> "It is not surprising that many States have held fast to or resurrected the common-law rule prohibiting consideration of voluntary intoxication in the determination of *mens rea*, because that rule has considerable justification—which alone casts doubt upon the proposition that the opposite rule is a 'fundamental principle.' A large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides, for example. [Citations.] Disallowing consideration of voluntary intoxication has the effect of increasing the punishment for all unlawful acts committed in that state, and thereby deters drunkenness or irresponsible behavior while drunk. The rule also serves as a specific deterrent, ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison. And finally, the rule comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences. [Citation.]" (*Montana*, *supra*, 518 U.S. at pp. 49-50, plur. opn., fn. omitted.)

The *Montana* court noted the well-settled principle that "the introduction of relevant evidence can be limited by the State for a 'valid' reason …." (*Montana*, *supra*, 518 U.S. at p. 53.) As long ago as 1969, the California Supreme Court recognized the commonly-held public belief that "a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences." (*People* v. *Hood* (1969) 1 Cal.3d 444, 455.) The 1982 and 1995 amendments to section 22 are a reflection of this public perception.

Several courts have addressed the constitutional validity of the legislative enactments abolishing the defense of diminished capacity (specifically, sections 22, 28

and 29), and found no due process violation. (See, e.g., *People* v. *Saille* (1991) 54 Cal.3d 1103, 1116; *People* v. *Whitler* (1985) 171 Cal.App.3d 337, 340-341; *People* v. *Lynn* (1984) 159 Cal.App.3d 715, 732-733; *People* v. *Jackson* (1984) 152 Cal.App.3d 961, 967-970.) It is informative to review the basis for such a finding.

In *People* v. *Lynn*, *supra*, the court opined:

> "The exclusion of the capacity evidence represented by sections 22, 28 and 29 is not of constitutional dimension [citation]. It is 'nothing more than a legislative determination that for reasons of reliability or public policy, "capacity" evidence is inadmissible' [citation]. The enactment neither prevented [the defendant] from disproving the mental state necessary to the charges nor deprived him of his constitutional right to require the People to prove every fact necessary to constitute the crime beyond a reasonable doubt [citations].
>
> "....
>
> "We observe it has recently been held there is no due process impediment in the substantive statutory definition of felony murder which omits malice as an element of that crime [citation]. The deletion of malice gives rise to no presumption which must pass due process muster [citation]. It occurs to us that if the Legislature may constitutionally delete malice as an element of felony murder, it may also constitutionally delete diminished capacity as a defense to crimes requiring particular mental states. In both cases, we are dealing with a matter of substantive statutory definition [citation]. In neither case is there a presumption involved that must withstand constitutional due process scrutiny because of its burden shifting effect." (*People* v. *Lynn*, *supra*, 159 Cal.App.3d at pp. 732-733; see also *People* v. *Saille*, *supra*, 54 Cal.3d at p. 1116 [abolition of diminished capacity defense and limitation of admissible evidence to actual formation of various mental states does not violate due process right to present a defense].)

The Legislature's most recent amendment to section 22 is closely analogous to its abrogation of the defense of diminished capacity. We therefore find the reasoning of *Lynn* applicable here. The 1995 amendment to section 22 results from a legislative determination that, for reasons of public policy, evidence of voluntary intoxication to negate culpability shall be strictly limited. We find nothing in the enactment that deprives a defendant of the ability to present a defense or relieves the People of their

burden to prove every element of the crime charged beyond a reasonable doubt, including, in this case, knowledge.

Accordingly, we find no due process violation. Thus, the court did not err in instructing the jury with CALJIC No. 4.20, rather than CALJIC No. 4.21.

III. Denial of motion for change of venue[*]

Defendant contends the court erred by denying her motion for a change of venue and, as a result, she was denied her constitutional right to a fair trial. Defendant claims the motion should have been granted due to the extensive publicity regarding the case. We disagree.

A. Standard of review

> "Pursuant to section 1033, subdivision (a), the court must grant a motion for change of venue if 'there is a reasonable likelihood that a fair and impartial trial cannot be had in the county.' The phrase 'reasonable likelihood' in this context 'means something less than "more probable than not,"' and 'something more than merely "possible."' [Citation.] In ruling on such a motion, as to which defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status of the accused. [Citations.]
>
> "'On appeal after a judgment following the denial of a change of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not *in fact* had. [Citations.]' [Citations.]
>
> "With regard to the first part of the showing required of a defendant on appeal, we employ a standard of de novo review of the trial court's ultimate determination of the reasonable likelihood of an unfair trial. [Citations.] This requires our independent determination of the weight of the five controlling factors described above. [Citations.] With regard to the second part of the showing, in order to determine whether pretrial publicity

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[*] See footnote *, *ante*.

> had a prejudicial effect on the jury, we also examine the voir dire of the jurors. [Citations.]" (*People* v. *Proctor* (1992) 4 Cal.4th 499, 523-524; accord *People* v. *Hart* (1999) 20 Cal.4th 546, 598-600.)

While we independently review the trial court's ultimate determination of the reasonable likelihood of an unfair trial, "[t]he trial court's essentially factual determinations such as the gravity of the crimes, the size of the community, the status of the defendant and victims, and the nature and extent of the pretrial publicity, will be sustained if supported by substantial evidence." (*People* v. *Cooper* (1991) 53 Cal.3d 771, 806.) Where, as here, extensive publicity forms the basis for a claim of potential prejudice,

> "the ability to assure the defendant a fair trial, and the impact of prejudicial publicity, are measured by whether the defendant has '"a panel of impartial, 'indifferent' jurors." [Citation.] Qualified jurors need not, however, be totally ignorant of the facts and issues involved. [¶] … "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." [Citation.] [¶] At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." [Citation.]' [Citation.]" (*People* v. *Bean* (1988) 46 Cal.3d 919, 941.)

Where denial of a change of venue is challenged pretrial by a petition for writ of mandate, "because the prejudicial effect of publicity … is necessarily speculative, it is settled that '"any doubt as to the necessity of removal … should be resolved in favor of a venue change."' [Citation.] After trial, any presumption in favor of a venue change is unnecessary, for the matter may then be analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected...." (*People* v. *Williams* (1989) 48 Cal.3d 1112, 1125.) Examination of actual voir dire is particularly useful where, as here, the court conducted individualized voir dire to determine whether pretrial publicity affected defendant's right to a fair trial. (*People* v. *Hernandez* (1988) 47 Cal.3d 315, 336.)

B. The trial court's ruling

In her initial motion for a change of venue, defendant presented various newspaper articles and a videotape of television coverage concerning the case. Following argument, the court stated:

> " … I would certainly take judicial notice that this is a highly publicized case, not only for the type of case [this] is, that is a fatal DUI type of accident when I'm referring to the charges themselves, and also the nature of the victim and what's taken place since then. Everybody is aware there was some talk about a memorial being constructed out on the highway, etcetera. As well as the numerous court proceedings we've had on this. I think I would be well within the court's prerogative of taking judicial notice of the large amount of publicity that has been generated to do with this case.
>
> "But that isn't really the test that we're here for. The real test is not whether the case has received a large amount of publicity, per se, but whether or not we can select a fair and impartial jury in this case.…
>
> "....
>
> " … The change of venue motion here is to move it out of the area where this high amount of publicity, which is conceded by the court, has taken place. My feelings are that the procedure with which we pick a jury, that is the voir dire process for which we have constructed a questionnaire and for which we are at least scheduled to interview the jurors pursuant to their responses to that questionnaire in a small setting with a few jurors at a time, will alleviate any of those problems.
>
> "....
>
> "I'm going to at this time deny the motion for a change of venue without prejudice to renew it once we get into the voir dire process of the various jurors...."

Defendant renewed her motion for a change of venue following jury selection, and the court again denied the motion.

C. Reasonable likelihood of unfair trial

We independently examine defendant's claim to determine whether she has met her burden of showing "... 'that denial of the venue motion was error (i.e., that it was reasonably likely a fair trial could not be had at the time the motion was made) and that

the error was prejudicial (i.e., that it was reasonably likely a fair trial was not in fact had)....' [Citations.]" (*People* v. *Hart*, *supra*, 20 Cal.4th at p. 598.)

1. Error in denial of motion

An independent evaluation of the weight of the five controlling factors fails to establish the "reasonable likelihood" required for reversal. With respect to the gravity and nature of the crime, defendant notes that murder is a serious crime. We do not disagree. The charged offenses here were serious and attracted the attention of the media. However, even in capital murder cases, there is no mandate to change venue. (*People* v. *Hart, supra,* 20 Cal.4th at p. 598.) Given the multitude of cases involving injuries caused by intoxicated drivers, we find the gravity and nature of this crime do not weigh in favor of a change of venue.

The size and nature of the community similarly do not support a venue change. The size of the county alone is not determinative; rather, "[t]he key is whether it can be shown that the population is of such a size that it 'neutralizes or dilutes the impact of adverse publicity.' [Citation.]" (*People* v. *Jennings* (1991) 53 Cal.3d 334, 363.) The population of Tulare County is of such a size. Indeed, the California Supreme Court has noted that cases in which changes of venue are granted or ordered on review usually involve counties with much smaller populations. "The size of Tulare County, which we have recognized is not a small community, does not weigh substantially in favor of a change of venue. [Citation.] With 253,000 inhabitants at the time of trial, Tulare County ranked 20th among California's 58 counties in population. [Citations.]" (*People* v. *Howard* (1992) 1 Cal.4th 1132, 1167; see also *People* v. *Whalen* (1973) 33 Cal.App.3d 710, 716 [size of Tulare County did not warrant change of venue].)

Neither defendant's status, nor that of the victims, favors a change in venue. Defendant was not likely to attract community hostility by association with any unpopular subculture or minority ethnic group. (See *People* v. *Welch* (1999) 20 Cal.4th 701, 744; *People* v. *Hamilton* (1989) 48 Cal.3d 1142, 1159.) Defendant acknowledges that, prior to the accident, the Busbys were not prominent. However, she argues "the

ensuing publicity transformed [Ian Busby] from a four-year old child who died in a tragic accident to a martyr for the cause of eradicating drunken driving." While crime victims may be loved and respected in their circle of family and friends, this does not necessarily equate to "prominence in the community" for purposes of determining a motion for change of venue. (See *People* v. *Pride* (1992) 3 Cal.4th 195, 225; *People* v. *Douglas* (1990) 50 Cal.3d 468, 495 [popularity not equated with prominence].) "Prospective jurors would have reason to sympathize with the victims and their families wherever the case was tried." (*Pride*, *supra*, 3 Cal.4th at p. 225.)

Finally, with respect to the extent and nature of the publicity, we find the media coverage was mostly factual and not particularly inflammatory. Moreover, while publicity was extensive early on, the amount of media coverage was "relatively minimal at the time of jury selection and trial." (*People* v. *Cummings* (1993) 4 Cal.4th 1233, 1276; see also *People* v. *Hart*, *supra*, 20 Cal.4th at p. 600 [fact articles were printed well before trial commenced weighed against change of venue].) We note the majority of the publicity was within the first six months following the accident, and nearly nine months prior to trial. Of the 37 articles submitted by defendant, only 3 were printed within the 6 months prior to her trial. All three articles related to defendant's request for a change of venue and were factual in nature. "'Through the passage of time, any potential prejudice was thereby significantly reduced.' [Citations.]" (*People* v. *Sully* (1991) 53 Cal.3d 1195, 1237 [denial of motion for change of venue upheld where substantial media coverage dissipated several months before venue motion].)

Defense counsel's estimate that 50 to 100 articles appeared in the local newspaper concerning the crime, and the court's comment that this was a highly publicized case, do not defeat the evidence in the record demonstrating that publicity had subsided prior to trial. In addition, the publicity in this case is less significant than in other cases in which a denial of a motion for change of venue was upheld. (See, e.g., *People* v. *Bonin* (1988) 46 Cal.3d 659, 677, overruled on other grounds in *People* v. *Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1 [media reported defendant's history of mental illness, prior convictions for

sexual offenses, involvement in torture and "black magic," convictions of 10 counts of murder, and death sentence]; *Odle* v. *Superior Court* (1982) 32 Cal.3d 932, 938-939 [more than 150 newspaper articles, 70 of which mentioned defendant in headlines].)

Thus, applying the above five factors, we conclude defendant has failed to show error, i.e., that it was reasonably likely a fair trial was not possible.

2. Prejudice

Even if the court erred in denying defendant's motion for a change of venue, a new trial is not required because defendant has failed to show prejudice--that it was reasonably likely she did not receive a fair trial.

Defendant contends that eight of the twelve jurors "actually seated responded that they had in fact … read about Ian's death, and/or seen the memorial." Juror questionnaires and voir dire showed that many prospective jurors had heard or read about the case.

> "That fact, however, is not in itself sufficient to require a change of venue. [The California Supreme Court] explained in *People* v. *Harris* [(1981)] 28 Cal.3d 935, that '"juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone [does not] presumptively deprive[] the defendant of due process."' [Citations.] '"It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."' [Citations.]" (*People* v. *Daniels* (1991) 52 Cal.3d 815, 853.)

Our review of voir dire revealed only a passing recollection or a general familiarity with the accident on the part of the eight jurors. Further, the court obtained a commitment from the jurors that they could keep an open mind and set aside previous facts they had heard about the case. No suggestion to the contrary appears in the record. (*People* v. *Sully*, *supra*, 53 Cal.3d at p. 1238; see also *People* v. *Hart*, *supra*, 20 Cal.4th at p. 600.)

"The voir dire process confirmed what the above factors suggest: that … it was feasible to obtain an unbiased jury and a fair trial despite the pretrial publicity the crime received." (*People* v. *Welch*, *supra*, 20 Cal.4th at p. 745.) In light of the foregoing, we

conclude defendant was not denied a fair trial because the court refused a change of venue.

IV. Propriety of convictions for both second degree murder and gross vehicular manslaughter while intoxicated[*]

Defendant argues that her convictions for both second degree murder and gross vehicular manslaughter while intoxicated cannot be upheld. Defendant notes she may not be convicted of both a greater and a lesser included offense based on the same conduct. (See *People* v. *Pearson* (1986) 42 Cal.3d 351, 355 ["multiple convictions may *not* be based on necessarily included offenses[]"].) The issue, then, is whether gross vehicular manslaughter while intoxicated is a lesser included offense of second degree murder.

We note at the outset that appellate courts have disagreed, and the issue is pending before the California Supreme Court. (See *People* v. *Gonzalez* (1998) 61 Cal.App.4th 461 [Second Dist., Div. Four], review granted June 17, 1998 (S069308) [gross vehicular manslaughter while intoxicated lesser included offense of second degree murder]; *People* v. *Sanchez* (1997) 59 Cal.App.4th 545 [Second Dist., Div. Seven], review granted Feb. 25, 1998 (S066991) [gross intoxicated vehicular manslaughter not lesser included offense of murder]; see also *People* v. *Watson* (1983) 150 Cal.App.3d 313[Third Dist.] (*Watson II*) [vehicular manslaughter lesser included offense of murder].)

Nonetheless, the principles of law related to lesser include offenses are well-settled. "'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.' [Citations.]" (*People* v. *Pearson*, *supra*, 42 Cal.3d at p. 355; accord *People* v. *Ortega* (1998) 19 Cal.4th 686, 692.) The determination of whether an offense cannot be committed without necessarily committing the included offense is

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[*] See footnote *, *ante*.

based upon the statutory definitions of both offenses and the language of the accusatory pleading. (*Id.* at p. 698; see *Pearson*, *supra*, 42 Cal.3d at pp. 355-356.)

> "[A] strict test has been developed, based on the elements of the crime as defined in the particular criminal statute: A crime is an included offense if all of its elements are also elements of the other crime, so that substantially the same facts would be required to prove the commission of either. And a crime is not an included offense if any of its elements is not an element of the other crime, so that one requires proof of some fact in addition to the facts required to establish the other." (1 Witkin, Cal. Criminal Law (2d ed. 1988) § 325, p. 376.)

"The necessarily included offense rule is used to determine whether a defendant improperly has been convicted of both a greater offense and an included offense, or properly has been convicted of separate offenses." (*People* v. *Ortega*, *supra*, 19 Cal.4th at p. 693.)

In *People* v. *Garcia* (1995) 41 Cal.App.4th 1832, 1851-1855, we held that gross vehicular manslaughter is a lesser included offense of murder, reasoning:

> "To say that because a murder can be committed without using a vehicle or being intoxicated, those additional 'elements' take it outside the included elements of murder ignores the fact that, for example, murder can be committed without the heat of passion of voluntary manslaughter. Thus, the additional circumstance of heat of passion is no different than that of intoxication or use of a vehicle as they relate to an unlawful homicide. Therefore, we conclude for purposes of the lesser offense analysis of unlawful homicide, the relevant inquiry turns on the core of an unlawful killing of a human being and not on the circumstances or type of unlawful killing.
>
> "....
>
> " … [T]he specific crimes of murder, voluntary manslaughter, involuntary manslaughter, and vehicular manslaughter are simply different circumstances under which a homicide is unlawful and bear upon punishment.… Therefore, we find gross vehicular manslaughter while intoxicated to be a lesser included offense of murder." (*Id.* at pp. 1854-1855.)

We decline to revisit the issue. Therefore, defendant's conviction for gross vehicular manslaughter is reversed.

V. Sufficiency of the evidence[*]

Defendant contends there is insufficient evidence to support her convictions for second degree murder and hit-and-run driving. We disagree.

A. Standard of review

This court's role in reviewing evidence to determine whether it is sufficient to sustain a conviction is "a limited one." (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206.)

> "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People* v. *Jones* (1990) 51 Cal.3d 294, 314; accord *People* v. *Bolin* (1998) 18 Cal.4th 297, 331.)

Reversal based on insufficiency of evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*Ibid.*)

Additionally, the credibility of witnesses "is the exclusive province of the trial judge or jury to determine …." (*People* v. *Jones, supra,* 51 Cal.3d at p. 314.) Therefore, we must "accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*Ibid.*)

B. Second degree murder conviction

Defendant contends there is insufficient evidence of implied malice to support her second degree murder conviction. She maintains the evidence was only sufficient to support a conviction for gross vehicular manslaughter.

> "[S]econd degree murder based on implied malice has been committed when a person does '"'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with

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[*] See footnote *, *ante*.

> conscious disregard for life'" ….' [Citations.] Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. [Citation.]" (*People* v. *Watson* (1981) 30 Cal.3d 290, 300 (*Watson I*); see also *People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 104; § 188 [malice implied "when the circumstances attending the killing show an abandoned and malignant heart"]; CALJIC Nos. 8.11, 8.31.)

Defendant argues the evidence suggests she began her drinking at the Kneeland residence hours before she ever contemplated driving her car, since Kneeland found her "passed out on the couch" at approximately 2:30 p.m. Defendant notes there was no evidence that, although a reported alcoholic, she had previously been involved in any type of drinking and driving accident, which would have placed her on notice of the adverse consequences of drinking and driving. Defendant also notes she did not drive to an establishment such as a bar, where one would anticipate drinking. Defendant argues that the prior accidents in which she was involved on August 30, 1996, constituted "one continuous series of events" during which she was unaware of the reality of her situation. Defendant's analysis does not support reversal of the second degree murder conviction.

Defendant consumed enough alcohol to raise her blood alcohol content to .27 percent. Regardless of the fact defendant was not in a bar when she consumed alcohol, she nonetheless drank *knowing* that she would have to later operate a motor vehicle. It is undisputed that defendant, herself, drove to the Kneeland residence. She must have known she would have to later drive home. In addition, defendant drank *knowing* her history of alcoholism. Given the many treatment programs defendant attended, it may be reasonably inferred defendant knew she was unable to control her drinking and therefore would drink to excess. It may also be presumed that defendant was aware of the hazards of driving while intoxicated. (*Watson I, supra*, 30 Cal.3d at p. 300.) As a result, it may reasonably be concluded that defendant consciously disregarded the safety of others. As expressed by the California Supreme Court over 20 years ago:

> "... There is a very commonly understood risk which attends every motor vehicle driver who is intoxicated. [Citation.] One who wilfully

> consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others. The effect may be lethal whether or not the driver had a prior history of drunk driving incidents." (*Taylor* v. *Superior Court*, *supra*, 24 Cal.3d at pp. 896-897; accord *Watson I, supra*, 30 Cal.3d at pp. 300-301.)

Defendant drove her vehicle into her employer's garage. She left the scene and drove down the wrong side of the road on the Mineral King extension before hitting another vehicle. She again left the scene and almost hit a woman on Highway 198 when she (defendant) swerved across two lanes of traffic to exit. Finally, defendant ran a red light at an excessive rate of speed, killing a four-year-old child and injuring his mother.

In sum, the record contains sufficient evidence from which the trier of fact could reasonably conclude defendant acted with a conscious disregard for human life.

C. Hit-and-run driving conviction

Defendant next argues the evidence is insufficient to support her hit-and-run driving conviction. She notes that she provided her driver's license to Holcomb, which he wrote down, and argues that nothing in Vehicle Code section 20002 required her to remain at the scene, even if requested by one of the parties to the accident.

Vehicle Code section 20002 states, in relevant part:

> "(a) The driver of any vehicle involved in an accident resulting in damage to any property, including vehicles, shall immediately stop the vehicle at the scene of the accident and do either of the following:
>
> "(1) Locate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his or her driver's license, and vehicle registration to the other driver, property owner, or person in charge of that property. The information requested shall include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he or she shall also, upon request, present his or her driver's license information, if available, or other valid identification to the other involved parties.

> "(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol."

The regulatory purpose of Vehicle Code section 20002 is to provide the owners of property damaged in traffic accidents with the information they need to pursue their civil remedies. The crime of hit-and-run driving is complete upon the running, whether or not the offending driver's conduct caused substantial or minimal damage or injury; it is the *running* that offends public policy. (*People* v. *Carbajal* (1995) 10 Cal.4th 1114, 1124.) "The essential elements of a violation of section 20002, subdivision (a) are that the defendant: (1) knew he or she was involved in an accident; (2) knew damage resulted from the accident; and (3) knowingly and willfully left the scene of the accident (4) without giving the required information to the other driver(s). [Citation.]" (*Id.* at p. 1123, fn. 10.)

Here, defendant did stop her vehicle after hitting Holcomb's car. Holcomb testified that defendant asked if he had insurance and that he provided her with all his information, although she was unable to write any of it down. Holcomb also testified that he "ended up" seeing defendant's license, but that defendant was acting strangely, so he requested that she wait while he telephoned the police. Defendant fled the scene without providing any other information to Holcomb, including her vehicle registration. Admittedly, it is unclear whether Holcomb specifically asked to see defendant's vehicle registration. Even so, a reasonable inference can be drawn that, by providing defendant with his driver's license and vehicle registration and asking her to wait at the scene while he called the police, Holcomb impliedly requested all relevant information from defendant, including her vehicle registration. As a result, the jury could reasonably conclude that defendant failed to provide the information required under Vehicle Code

section 20002, subdivision (a), before leaving the scene of the accident. The hit-and-run driving conviction is thus supported by sufficient evidence.

DISPOSITION

The conviction of gross vehicular manslaughter while intoxicated is reversed. In all other respects, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections.

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WISEMAN, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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THAXTER, J.